United Cerebral Palsy of New York City, Inc. *and* United Federation of Teachers, Local 2, American Federation of Teachers, AFL–CIO. Case 29–CA–24569

September 28, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 25, 2001,[1] the General Counsel issued the complaint and an amendment to the complaint on December 7, 2001 and January 11, 2002, respectively, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 29–RC–9578.[2] (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer to the complaint and to the amendment to the complaint admitting in part and denying in part the allegations in the complaint as amended, and alleging an affirmative defense.

On June 28, 2004, the General Counsel filed a second Motion for Summary Judgment. On July 2, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The Union filed a brief in support of the General Counsel's second motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Second Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish information, but contests the validity of the certification based on its contention, raised and rejected in the representation proceeding, that the bargaining unit improperly includes statutory supervisors.[3]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

[1] The Respondent's answer to the complaint denies the allegation that the charge was filed. The General Counsel, however, has attached copies of the charge and affidavits of service of the charge as exhibits to the second Motion for Summary Judgment, and the Respondent has not challenged the authenticity of those exhibits. Accordingly, it is clear that the charges were filed and served as alleged.

[2] On January 28, 2002, counsel for the General Counsel filed a Motion for Summary Judgment. On February 1, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 15, 2002, the Respondent filed a Cross-Motion for Summary Judgment, contending that in light of the United States Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the Board should find that all the individuals in the two voting groups (teachers, habilitation specialists, developmental specialists, and pool coordinators) are statutory supervisors. By unpublished Order dated October 29, 2002, the Board denied both the General Counsel's and Respondent's motions and ordered the Region to reopen the record in Case 29–RC–9578 for further consideration of whether the disputed employees are supervisors in light of *Kentucky River* and other cases. On August 6, 2003, the Acting Regional Director issued a Supplemental Decision in Case 29–RC–9578, finding that the disputed employees are not supervisors. On September 2, 2003, the Respondent filed a request for review of the Supplemental Decision, which the Board denied by unpublished Order dated May 28, 2004.

[3] The Respondent's answer effectively denies the complaint allegation that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. This denial, however, does not raise any issue warranting a hearing. The Respondent stipulated in the representation proceeding in Case 29–RC–9513 that the Union is a Sec. 2(5) labor organization, and the Respondent did not contest the Union's labor organization status in the underlying representation case (Case 29–RC–9578).

The Respondent's answer also denies para. 6 of the complaint, which, as amended, sets forth the combined appropriate unit. However, the appropriateness of the unit was considered and determined by the Board and Regional Director in the underlying representation proceeding. Accordingly, we find that the appropriate unit is as stated in the amended complaint and the Respondent's denial does not raise any litigable issues in this proceeding.

In addition, the Respondent's answer denies or effectively denies various other allegations in the complaint, including the allegation that the Union has been the exclusive representative pursuant to Sec. 9(a) of unit A and the combined unit; the allegation that on November 27, 2000, the Union filed a petition in Case 29–RC–9578; and allegations regarding the April 26, 2001 election in Case 29–RC–9578. However, the General Counsel has submitted documentary evidence supporting each of these allegations, including the certifications of representative issued by the Board in Cases 29–RC–9513 and 29–RC–9578; the November 27, 2000 petition filed by the Union; and the tally of ballots in the April 26, 2001 election, and the Respondent has not disputed the authenticity of any of these documents in response to the Notice to Show Cause. Accordingly, we find that the Respondent's denials do not raise any issue warranting a hearing. *United Electrical Contractors Assn.*, 312 NLRB 1118 (1993).

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent's answer admits, that the Union requested the following information about the bargaining unit employees from the Respondent by letter dated May 17, 2001:

(a) name;
(b) title;
(c) date of hire;
(d) regular work week hours;
(e) regular work year (10 month, 12 month, or other);
(f) vacation entitlement;
(g) current regular annual salary, educational credentials and prior work experience;
(h) date, amount and reason for most recent pay increase;
(i) amount of supplemental pay (above the regular annual salary) earned between July 1, 1999, and June 30, 2000, and the reason (e.g. summer school employment, overtime earnings, signing bonus, merit increase, etc.);
(j) health plan coverage (individual or family);
(k) participation in 403 B plan (yes or no);
(l) job descriptions for each title; and
(m) current UCP pay grades applicable to these titles.

Although the Respondent's answer denies that the information requested is necessary and relevant to the Union's duties as the exclusive bargaining representative of the unit employees, it is well established that all of the foregoing types of information are presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Cheboygan Health Care Center*, 338 NLRB No. 115 (2003); *Baker Concrete Construction*, 338 NLRB No. 48 (2002), and cases cited therein. The Respondent has not asserted any basis for rebutting the presumptive relevance of the information, apart from its contention, rejected above, that the Union's certification is invalid.

In its response to the Notice to Show Cause, the Respondent seeks to excuse its failure to comply with the Union's May 17, 2001 information request on the basis that it was engaged in litigation to test the validity of the Union's certification as bargaining representative. There is no merit in the Respondent's defense. It is well settled that collateral litigation does not suspend the duty to bargain. See generally *Dresser Industries*, 252 NLRB 631, 632 (1980), enfd. as modified 654 F.2d 944 (4th Cir. 1981). The duty to bargain encompasses the duty to provide relevant information. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Thus, the Respondent was obligated to comply with the Union's information request, notwithstanding that it was testing the Union's certification. *L.F. Strassheim Co.*, 171 NLRB 916 (1968).

Accordingly, we grant the General Counsel's Motion for Summary Judgment, and will order the Respondent to bargain and to furnish the information requested by the Union.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation, with its principal office and place of business located at 80 Maiden Lane, New York, New York, and with treatment facilities in various locations including those located at 160 and 175 Lawrence Avenue, Brooklyn, New York (the Brooklyn facilities), has been engaged in providing treatment and other services to people with cerebral palsy and other disabilities. During the 12-month period preceding issuance of the complaint, which period is representative of its annual operations generally, the Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $500,000 and purchased and received at its Brooklyn facilities products, goods and materials valued in excess of $5000 directly from points located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

At all material times, the Union has been the designated exclusive collective-bargaining representative of the following unit (unit A), which is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time physicians' assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapist assistants, physical therapist assistants, licensed practical nurses, custodians, and sup-

portive employment specialists employed by the Employer at its facilities located at 160 Lawrence Avenue, Brooklyn, New York and 175 Lawrence Avenue, Brooklyn, New York, excluding all confidential employees, office clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

On April 26, 2001, the Board conducted self-determination elections in the following two voting groups to determine whether the employees desired to be included in unit A:

Professional Voting Group: All full-time and regular part-time teachers employed in Respondent's early intervention program, pre-school program, and school-age program employed by Respondent at the Brooklyn facilities, excluding all other employees and supervisors as defined in the Act.

Non-Professional Voting Group: All full-time and regular part-time daycare teachers, habilitation specialists, developmental specialists and pool coordinators employed by Respondent at the Brooklyn facilities, excluding all other employees and supervisors as defined in the Act.

A majority of each voting group voted for the Union and for inclusion in Unit A. On May 10, 2001, the Regional Director certified the Union. The following combination of employees (the combined unit), constitutes a unit appropriate for the purposes of collective bargaining under Section 9(b) of the Act:

All full-time and regular part-time physicians' assistants, computer training specialists, occupational therapists, physical therapists, registered nurses, physicians, psychologists, speech pathologists, audiologists, dieticians, social workers, assistant teachers, habilitation assistants, program assistants, administrative assistants, recreation assistants, social worker assistants, certified occupational therapist assistants, physical therapist assistants, licensed practical nurses, custodians, supportive employment specialists, day-care teachers, habilitation specialists, developmental specialists, pool coordinators, teachers employed in Respondent's early intervention program, pre-school program, and school-age program at the Brooklyn facilities, excluding all confidential employees, office clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

At all times since April 26, 2001, based on Section 9(a) of the Act, the Union has been and continues to be the exclusive collective-bargaining representative of the combined unit.

B. Refusal to Bargain

About May 17, 2001, the Union, by letter, requested the Respondent to bargain and to furnish necessary and relevant information, and, since May 22, 2001, the Respondent has failed and refused to do so. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after May 22, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union necessary and relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union the information it requested relating to unit employees.[4]

ORDER

The National Labor Relations Board orders that the Respondent, United Cerebral Palsy of New York City, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Federation of Teachers, Local 2, American Federation of Teachers, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[4] The General Counsel has requested that the Board require the Respondent to bargain in good faith with the Union as the exclusive representative of the unit for the period set forth in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). We find that such a remedy would be inappropriate in this case, where the underlying representation proceeding involved a self-determination election. See *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

(a) On request, bargain with the Union as the exclusive representative of the following group of employees as part of the appropriate unit of employees employed by the Respondent on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time day-care teachers, habilitation specialists, developmental specialists, pool coordinators, teachers employed in Respondent's early intervention program, pre-school program, and school-age program at the Brooklyn facilities, excluding all confidential employees, office clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) Furnish the Union the information that it requested on May 17, 2001, relating to the above-listed unit employees.

(c) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with United Federation of Teachers, Local 2, American Federation of Teachers, AFL–CIO, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees set forth below as part of the appropriate unit of employees employed by us in the bargaining unit:

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All full-time and regular part-time day-care teachers, habilitation specialists, developmental specialists, pool coordinators, teachers employed in Respondent's early intervention program, pre-school program, and school-age program at the Brooklyn facilities, excluding all confidential employees, office clerical employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL furnish the Union the information it requested on May 17, 2001.

UNITED CEREBRAL PALSY OF NEW YORK CITY, INC.